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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 809

J. H. ANDERSON,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

M. W. EGERTON,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 809

J. H. ANDERSON,
Petitioner,
vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

I

Summary Statement of Matters Involved.

THE COMPLAINT

This is a suit brought by petitioner in the District Court of the United States for the Eastern District of Tennessee against the respondent for the recovery of income taxes erroneously and illegally collected from petitioner for the calendar year 1935, which taxes had been assessed and collected by reason of the Commissioner including as income of petitioner, the income of an irrevocable term trust established by petitioner for a term beginning July 21, 1931 and

ending January 1, 1937, the income from which was used for religious purposes, as provided in the trust agreement (R. 1-4).

The Answer

The respondent admitted the execution of the trust indenture but denied that the tax had been illegally assessed and collected (R. 6, 7).

The Facts

The case was tried on a written stipulation, the statements in which were true (R. 8). These statements (omitting those concerned with the payment and claim for refund of the tax) are as follows:

> "3. Plaintiff, on July 21, 1931, by indenture bearing that date, created a trust of the corpus of his deceased wife's estate for the benefit of the First Baptist Church of Knoxville, Tennessee, of which plaintiff and his deceased wife, until the time of her death, had been members. Plaintiff has continued to be a member of that Church since that time. The term of the trust was from July 21, 1931 to January 1, 1937, and was irrevocable during that period.
>
> "4. Plaintiff appointed the Hamilton National Bank of Knoxville, Tennessee, as trustee of the trust, and the Hamilton National Bank accepted such appointment as trustee. A copy of such trust indenture executed by plaintiff and the Hamilton National Bank, as trustee, is filed as Exhibit 2 hereto and is made a part hereof.
>
> "5. Plaintiff transferred and delivered the corpus of his deceased wife's estate to the Hamilton National Bank as trustee under the trust indenture. A copy of the receipt of the Hamilton National Bank of the corpus is attached hereto as Exhibit 3 and made a part hereof.
>
> "6. The Hamilton National Bank, as trustee, managed the trust estate, collected the income therefrom, and annually distributed the net income to the First Baptist Church of Knoxville, Tennessee, according to

the provisions of the trust indenture. The said First Baptist Church is an association, organized and operated exclusively for religious and charitable purposes, no part of the net earnings of which inures to the benefit of the plaintiff, or any other members or individuals, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and is exempt from taxation under the Revenue Act of 1934.

"7. No part of the income of the trust was distributed to plaintiff or any member of his family, or was used to discharge any legal obligation of plaintiff or his family, or to pay premiums for insurance on the life of plaintiff or his family."

Exhibit 3 to the stipulation (R. 9, Item 5, R. 45) shows that the corpus of the trust received by the trustee consisted of various stocks having a par value of $161,000.00; and notes, bonds and cash having a face value of $147,000.00. No notes or bonds executed by the grantor of the trust were among the securities so held.

Exhibit 2 to the stipulation (R. 8-9, Item 4, R. 42), the trust indenture, is summarized as follows:

The indenture is dated July 21, 1931, and is between petitioner and the Hamilton National Bank of Knoxville, as trustee.

The reason for the creation of the trust is set out as the desire of petitioner to aid and assist the First Baptist Church of Knoxville, Tennessee, in its contributions to the cooperative program of the Southern Baptist Convention.

The corpus of the trust is created by the transfer and delivery to the trustee of securities and personal property.

The first paragraph provides for the trustee to collect the income from the corpus and pay it, less expenses and the fee of the trustee, to the First Baptist Church.

The second paragraph authorizes the trustee to invest, reinvest and exchange the securities of the trust for others

of equal value, but "in order that the settlor may safeguard the interest of the beneficiary" before exercising this power the trustee must obtain the approval of the settlor, or, in the event of his death, the approval of his executor.

The third paragraph reserves to the petitioner the right to vote all stocks held by the trustee "in order to enable the settlor to safeguard the interest of the beneficiary".

The fourth paragraph provides that stock dividends, if any, shall be considered principal.

The fifth paragraph provides that the trust is irrevocable for its term ending January 1, 1937, and for the transfer of the then corpus of the trust upon termination to the settlor or his executors.

The sixth paragraph authorizes the trustee to retain as part of the corpus any security originally deposited, without liability for depreciation in value, and permits the trustee to resign at any time upon thirty days' notice.

The seventh paragraph gives the settlor the right to change the trustee and provides that any successor trustee "shall undertake to perform the duties and obligations imposed upon the trustee herein".

The eighth paragraph provides for compensation to the trustee for its services and excuses qualification, bond and settlement as required by law.

The agreement is then executed by the parties on July 21, 1931.

The Opinion of the District Court

The District Court awarded petitioner a judgment, finding as a matter of fact, that the sole income from the corpus of the trust estate was paid to the cestui que trust, no legal duty resting upon the setlor to contribute any amount of the cestui que trust, and no part of the income or corpus, during the life of the trust, being diverted to any direct or

indirect legal reponsibility of the settlor; that the petitioner, in fact, received no economic gain and non-material satisfaction could not be substituted for economic gain; that the corpus of the trust was transferred and delivered to the trustee and that the trustee, in fact, was the sole administrator of the property and none of the controls reserved in the settlor were exercised; that these reserved powers were insubstantial and short of an effective retention of ownership (R. 14-15).

The Appeal and Decision on Appeal

The respondent appealed to the United States Circuit Court of Appeals for the Sixth Circuit, which Court, on December 2, 1942, reversed the decision of the District Court, holding (a) that the question of ownership, within the meaning of Sec. 22 (a) of the Revenue Act of 1934, was a question of law, or at least a mixed question of law and fact, and that a finding of fact by the District Court that petitioner was not the owner of the corpus of the trust, was subject to review on appeal as a conclusion of law (R. 23); (b) that the trust instrument involved established a technical trust only (R. 25); (c) that the use of the income for religious purposes, giving the settlor non-material satisfaction, was the equivalent of a use for family purposes; and (d) that petitioner remained the owner of the income of the trust, within the meaning of Sec. 22 (a) under the standards of the Horst and Clifford cases (R. 26).

Federal Statute Involved

The Federal statute involved is Sec. 22 (a) of the Revenue Act of 1934, reading as follows:

"Sec. 22. Gross Income.

(a) General Definition—'Gross income' includes gains, profits, and income derived from salaries, wages

or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly."

Revenue Act of 1934, Ch. 277, 48 Stat. 680 (U. S. C. Title 26, Sec. 22).

II

Jurisdiction.

The Court has jurisdiction to review the judgment of the Circuit Court of Appeals under Title 28 U. S. C. A., Sec. 347. The judgment of the United States Circuit Court of Appeals for the Sixth Circuit sought to be reviewed was rendered December 2, 1942 (R. 21); a petition to rehear having been seasonably filed, was denied on February 2, 1943 (R. 41); and the judgment became final on that date. This petition, together with a certified transcript of the record is filed in this Court within three months after said judgment became final.

III

The Questions Presented.

1. Is the question as to whether or not the grantor of a trust remains the owner of the corpus of the trust and taxable on the income thereof under Sec. 22 (a) of the Revenue Act of 1934, a question of fact to be determined by the trier

of the facts in accordance with the applicable principles of law, and, if supported by substantial evidence, subject to review by an appellate court for errors of law only, or is the issue one of law or mixed law and fact on which a Court of Appeals can made a new finding?

The Circuit Court of Appeals held herein that the issue was one of law—or mixed law and fact, and thereupon made a new finding, reversing the lower court.

Petitioner insists that the question is one of fact, and if the finding of the lower court is supported by substantial evidence, it is reviewable for errors of law only.

2. Does the grantor of a trust remain the owner of the corpus of the trust and taxable on the income thereof under Sec. 22 (a) of the Revenue Act of 1934, where the facts stipulated and found by the District Court, and not set aside by the Appellate court, were:

(a) That the trust was irrevocable and created for a term beginning July 21, 1931, and ending January 1, 1937.

(b) That the title to and possession of the corpus was transferred and delivered to the trustee and the trustee managed the trust estate.

(c) That the income of the trust was paid by the trustee, pursuant to the terms of the trust agreement, to a religious association for religious purposes and no part thereof was subject to any control of, or direction by, the grantor, and the grantor received no economic gain therefrom—but only non-material satisfaction.

(d) That no controls over the corpus reserved by the settlor were, in fact, exercised or reserved for any purpose other than the protection of the beneficiary and consisted only of (1) the power to veto changes in and reinvestments of the corpus; (2) the power to amend proxies to vote stocks, and (3) the power to substitute trustees, but any substitute trustee to be bound by the terms of the trust indenture.

The District Court answered this question "No."

The Circuit Court of Appeals answered this question "Yes."

Petitioner insists that it should be answered "No."

IV

Reasons Relied On for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals herein holding that the question as to whether or not the grantor of a trust remains the owner of the corpus and taxable on the income thereof under Sec. 22 (a) of the Revenue Act of 1934 is a question of law, or a mixed question of law and fact on which a Court of Appeals can make a new finding is a decision of a Federal question in a way probably contrary to the applicable decisions of this Court, including:

Helvering vs. *Clifford, 309 U. S. 331;*
Hormel vs. *Helvering, 312 U. S. 552;*
Helvering vs. *Stuart, 63 S. Ct. 140.*

2. The decision on this matter is in conflict with the decision of the Circuit Court of Appeals for the *Seventh Circuit* on the same matter in the case of *Commissioner* vs. *Williamson,* decided December 29, 1942, not yet officially reported.

3. The decision of the Circuit Court of Appeals herein holding that the income of a term trust devoted to religious purposes, giving only non-material satisfaction to the grantor, is substantially equivalent to income from such a trust devoted to family purposes and thereby taxable to the grantor under the standards set in the cases of *Helvering* vs. *Horst,* 311 U. S. 112 and *Helvering* vs. *Clifford,* 309 U. S. 331, is a decision of a Federal question in a way probably in conflict with the applicable decision of this Court in the case of *Helvering* vs. *Stuart,* 63 S. Ct. 140.

4. The decision of the Circuit Court of Appeals herein holding that the grantor of a trust remained the owner

of the corpus of the trust and taxable on the income thereof under Sec. 22(a) of the Revenue Act of 1934, as a conclusion of law or a mixed question of law and fact, where the facts as stipulated and found by the District Judge and not set aside by the Appellate Court, were:

(a) That the trust was irrevocable and created for a term beginning July 21, 1931 and ending January 1, 1937.

(b) That the title to and possession of the corpus was transferred and delivered to the trustee and the trustee managed the trust estate.

(c) That the income of the trust was paid by the trustee, pursuant to the terms of the trust agreement, to a religious association for religious purposes and no part thereof was subject to any control of, or direction by, the grantor, and the grantor received no economic gain therefrom—but only non-material satisfaction.

(d) That no controls over the corpus reserved by the settlor were, in fact, exercised or reserved for any purpose other than the protection of the beneficiary and consisted only of (1) the power to veto changes in and reinvestments of the corpus; (2) the power to demand proxies to vote stocks, and (3) the power to substitute trustees, but any substitute trustee to be bound by the terms of the trust indenture.

is a decision of a Federal question in a way probably contrary to the applicable decisions of this Court, including:

Helvering vs. *Clifford,* 309 U. S. 331;
Helvering vs. *Stuart,* 63 S. Ct. 140;
Hormel vs. *Helvering,* 312 U. S. 552.

5. The decision on this matter is in conflict with the decision of the Circuit Court of Appeals for the *Second*

Circuit in the case of *Commissioner* vs. *Chamberlain*, 121 F. (2d) 765.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket, No. 9085, United States of America, Appellant, vs. J. H. Anderson, Appellee, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Sixth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated —— —, 1943.

J. H. ANDERSON,
By M. W. EGERTON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 809

J. H. ANDERSON,
Petitioner,
vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

I.

Opinions of the Courts Below.

The opinion in the District Court (R. 13-15) was rendered on December 6, 1940, and is not officially reported.

The opinion of the Circuit Court of Appeals (R. 22-27) was rendered on December 2, 1942, and is reported in 132 F. (2d) 98.

II.

Jurisdiction.

1. The date of the decree of the Circuit Court of Appeals for the Sixth Circuit to be reviewed is December 2, 1942 (R. 21). A petition to rehear, seasonably filed, was

denied on February 2, 1943, on which date the decree became final (R. 41). This petition, together with a certified transcript of the record, is filed within three months after said decree became final.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, U. S. C. A., Sec. 347.

III.

Statement of the Case.

This has already been stated in the preceding petition, I (pps. 1-4), which is hereby adopted and made a part of this brief.

IV.

Specification of Error.

1. The Circuit Court of Appeals erred in reversing the District Court and holding that the question as to whether or not the grantor of a trust remains the owner of the corpus and taxable on the income thereof under Sec. 22(a) of the Revenue Act of 1934 is a question of law, or a mixed question of law and fact on which a Court of Appeals can make a new finding.

2. The Circuit Court of Appeals erred in reversing the District Court and holding that income of a term trust devoted to religious purposes, giving only non-material satisfaction to the grantor, is substantially equivalent to income from such a trust devoted to family purposes and thereby taxable to the grantor under the standards set in the cases of *Helvering* v. *Horst,* 311 U. S. 112 and *Helvering* v. *Clifford,* 309 U. S. 331.

3. The Circuit Court of Appeals erred in reversing the District Court and holding that the grantor of a trust

remained the owner of the corpus of the trust and taxable on the income thereof under Sec. 22(a) of the Revenue Act of 1934, as a conclusion of law or a mixed question of law and fact, where the facts as stipulated and found by the District Judge and not set aside by the Appellate Court, were:

(a) That the trust was irrevocable and created for a term beginning July 21, 1931 and ending January 1, 1937.

(b) That the title to and possession of the corpus was transferred and delivered to the trustee and the trustee managed the trust estate.

(c) That the income of the trust was paid, pursuant to its terms, to a religious association for religious purposes and no part thereof was subject to any control of, or direction by, the grantor, and the grantor received no economic gain therefrom—but only non-material satisfaction.

(d) That no controls over the corpus reserved by the settlor were, in fact, exercised or reserved for any purpose other than the protection of the beneficiary and consisted only of (1) the power to veto changes in and reinvestments of the corpus; (2) the power to demand proxies to vote stocks, and (3) the power to substitute trustees, but any substitute trustee to be bound by the terms of the trust indenture.

V.

Summary of the Argument.

A. The writ should be granted because of the conflict between the decision of the Circuit Court of Appeals herein holding that income from a trust, which, pursuant to the terms of the trust, is devoted to a religious cause, giving non-material satisfaction to the grantor is the equivalent

of income from a trust devoted to family purposes and the decisions of this Court in the case of Helvering vs. Stuart, supra.

1. The Circuit Court of Appeals holds herein:

   "To make financial sacrifice to piety, or to establish a strong and predominant religion, often brings a satisfaction of one's desires greater than that gained from similar sacrifices for blood kin. In our opinion, under the standard set in the Clifford and Horst cases, the income of the so-called present trust was taxable to the appellee" (R. 27).

2. The trust indenture involved provides for the payment of the income of the trust to a religious association (R. 9, Ex. 2, R. 42).

3. The income was paid to the association as provided (R. 9, Item 6).

4. The grantor of the trust received only non-material satisfaction (R. 9, Item 7).

5. Economic gain realized or realizable is necessary to produce a taxable income.

   Helvering vs. Stuart, supra.

6. Non-material satisfaction arising from the use of the income of a trust for religious purposes is not a taxable substitute for economic gain arising from the use of such income for family purposes under the standard of the *Horst (Helvering vs. Horst,* 311 U. S. 112) and *Clifford (Helvering vs. Clifford,* 309 U. S. 331) cases.

   Helvering vs. Stuart, 63 S. Ct. 140.

7. The decision of the Circuit Court of Appeals herein holding non-material satisfaction derived from a use of income religious purposes to be the equivalent of economic gain derived from a family use of income is in direct conflict with the authoritative decision of this Court.

   Helvering vs. Stuart, supra.

B. The writ should be granted because of the conflict between the decision of the Court of Appeals herein holding that a finding under the facts by the District Judge that income of a trust is not income of the grantor thereof, within the meaning of Sec. 22(a) of the Revenue Act of 1934, supported by substantial evidence, is subject to review as a mixed question of law and fact by a Court of Appeals and not for errors of law only and the decisions of this Court in the case of Helvering v. Clifford, supra, Hormel v. Helvering, supra, and Helvering v. Stuart, supra, and because the decision herein is in direct conflict with a decision of the same matter by the Circuit Court of Appeals for the Seventh Circuit in the case of Commissioner v. Williamson, supra.

1. The District Judge found as a fact that the grantor of the trust was not the owner of the corpus of the trust and not taxable on the income thereof under Sec. 22(a) of the Revenue Act of 1934 (R. 14).

2. The question is one of fact for determination by the trier of the facts in accordance with applicable principles of law.

Helvering vs. Clifford, supra;
Helvering vs. Stuart, supra;
Commissioner vs. Goulder, 123 F(2d) 686;
Commissioner vs. Williamson, supra.

3. The District Judge having considered the factual relationship between the grantor of the trust and the use of the income and the purpose and effect of the controls reserved by the grantor over the corpus, and his determination being supported by substantial evidence, this finding can be reviewed on appeal only for errors of law.

Helvering vs. Stuart, supra;
Hormel vs. Helvering, supra;
Commissioner vs. Williamson, supra.

4. The decision of the Circuit Court of Appeals herein holding the question involved to be one of law or mixed law and fact and drawing a new conclusion as a matter of law without reference to the facts as found is contrary to the applicable decisions of this Court.

Helvering vs. Clifford, supra;
Hormel vs. Helvering, supra;
Helvering vs. Richter, 312 U. S. 561;
Helvering vs. Stuart, supra.

5. The decision of the Circuit Court of Appeals herein is directly contrary to that of the *Seventh Circuit* Court in the recent case of *Commissioner vs. Williamson, supra.*

C. The writ should be granted because of the conflict between the decisions of the Circuit Court of Appeals herein reversing the District Court and holding as a matter of law or a mixed question of law and fact that the reservation of insubstantial powers by the grantor of an irrevocable trust for a term beginning July 21, 1931 and ending January 1, 1937, in fact, not exercised or reserved for any purpose or use other than the protection of the beneficiary, where the income from the trust was paid pursuant to the terms of the trust agreement to the beneficiary thereof for religious purposes, and the grantor, neither directly nor indirectly, received any economic gain, was nevertheless income of the grantor under Sec. 22(a) of the Revenue Act of 1934, and the decisions of this Court in the cases of Helvering v. Clifford, supra; Hormel v. Helvering, supra; Helvering v. Stuart, supra; and because the decision herein is in direct conflict with a decision of the same matter by the Circuit Court of Appeals for the Second Circuit in the case of Commissioner v. Chamberlain, 121 F(2d) 765.

1. The question as to whether or not income of a trust is taxable to the grantor thereof under Sec. 22(a)

of the Revenue Act of 1934 is at least primarily a question of fact.

Helvering vs. Clifford, 309 U. S. 331;
Helvering vs. Stuart, 63 S. Ct. 140.

2. A finding of a trial court will not be set aside unless clearly erroneous.

Federal Rules of Civil Procedure, Rule 52(a).

3. Reservations of power by the grantor of a trust not in fact used or reserved by the grantor for some purpose other than the protection of the beneficiary, cannot give the grantor complete control of the corpus as a matter of fact.

4. Reservations of power by the grantor of a trust do not, as a matter of law, give the grantor control of the corpus unless they are so extensive that it must be said that the taxpayer is the owner.

Helvering vs. Clifford, supra;
Helvering vs. Stuart, supra;
Reinecke vs. Northern Trust Co., 278 U. S. 339;
Commissioner vs. Branch, 114 F. (2d) 985.

5. Ownership gives the right to income; the right to sell, pledge, give away or otherwise dispose of the corpus; to invest the corpus as owner sees fit; to manage the property and pay the income to whomsoever he will.

6. The negative powers reserved by the grantor herein to veto (not direct) investments; to vote (not sell—pledge—exchange—etc.) stocks; to substitute trustees (not manage, collect and distribute income and mingle the assets of the trust with his own), fall far short of ownership as a matter of law.

7. The use of income for a religious purpose, pursuant to the terms of the trust indenture giving the

grantor non-material satisfaction, is not a taxable substitute for economic gain.

8. Nor is a trust completely controlled as a matter of law merely because its term is approximately five and a half years.

Helvering v. *Wood*, 309 U. S. 344;
Commissioner v. *Chamberlain*, 121 F. (2d) 765.

9. The holding of the Circuit Court of Appeals in this case is apparently in conflict with the authoritative decisions of this Court.

10. The holding of the Circuit Court of Appeals in this case is in conflict with a decision of the Circuit Court of Appeals for the Second Circuit in the case of *Commissioner* v. *Chamberlain*, 121 F. (2d) 765.

11. The holding of the Circuit Court of Appeals in this case is the first holding the income of a charitable trust taxable to the grantor, and is contrary to other decisions on varying facts. The conflict should be resolved by this Court.

Argument.

A. The writ should be granted because of the conflict between the decision of the Circuit Court of Appeals herein holding that income from a trust, which, pursuant to the terms of the trust, is devoted to a religious cause, giving non-material satisfaction to the grantor is the equivalent of income from a trust devoted to family purposes and the decision of this Court in the case of Helvering v. Stuart, supra.

The petitioner in the instant case, neither directly nor indirectly, received any economic gain from the income of the trust established by him (R. 9, Item 7).

It was the insistence of the respondent in the Court below:

> "That the Clifford decision, when considered in the light of the clear implications of the Horst case, determines the issues here; and that the satisfaction which the taxpayer purchased by his transfer should be considered a taxable substitute for, and measured by, the income which he relinquished."

The Court of Appeals, in response to this insistence and in the concluding paragraph of its opinion, after quoting the "non-material satisfaction" paragraph of the opinion in the case of *Helvering* v. *Horst, supra,* holds:

> "To make financial sacrifice to piety or to establish a strong and dominant religion, often brings a satisfaction of one's desires greater than that gained from similar sacrifice for blood kin. In our opinion, under the standard set in the *Clifford* and *Horst* cases, the income of the so-called present trust was taxable to the appellee" (R. 27).

This opinion of the Court of Appeals was released shortly after the opinion of this Court in the case of *Helvering* v. *Stuart, supra,* wherein the statement in the *Horst* case was limited to its facts, and this Court held that "economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme".

The conclusion of the Court of Appeals in this case, being directly in conflict with the authoritative decision of this Court, it is respectfully submitted that the writ should issue.

B. The writ should be granted because of the conflict between the decision of the Court of Appeals herein holding that a finding under the facts by the District Judge that income of a trust is not income of the grantor thereof, within the meaning of Sec. 22(a) of the Revenue Act of 1934, supported by substantial evidence, is subject to review as a mixed question of law and fact by a Court of Appeals and not for errors of law only and the decisions of this Court in the cases of Helvering v. Clifford, supra, Hormel v. Helvering, supra, and Helvering v. Stuart, supra, and because the decision herein is in direct conflict with a decision of the same matter by the Circuit Court of Appeals for the Seventh Circuit in the case of Commissioner v. Williamson, supra.

The stipulation filed in this case provides "The statements contained in this stipulation are true" (R. 8). With the stipulation as a finding of fact, the District Judge, as the trier of facts, found:

> "The reservations in the settlor fall short of an effective retention of ownership * * *."
>
> "* * * the settlor was not himself the trustee, and although he reserved the right to change the trustee during the life of the trust, he never exercised the right, and according to the stipulation the trustee was sole administrator of the property trusteed and none of the controls reserved in the settlor was exercised * * *."
>
> "* * * since the sole income from the corpus estate, as a matter of actuality, was paid to the cestui que trust, no legal duty resting upon the settlor to contribute any amount to the cestui que trust, and no part of the income or corpus during the life of the trust being diverted to any direct or indirect legal responsibility of the settlor * * * the contention of the plaintiff is supported by the facts" (R. 14-15).

The question as to whether or not income is taxable to the grantor of a trust under Section 22 (a) of the Revenue

Act of 1934 is a question of fact to be determined by the triers of the facts in accordance with the applicable principles of law.

Helvering v. *Clifford, supra;*
Hormel v. *Helvering, supra;*
Helvering v. *Stuart, supra;*
Helvering v. *Richter,* 312 U. S. 561;
Helvering v. *Rankin,* 295 U. S. 123.

The form is to be disregarded and the actuality observed.

Helvering v. *Clifford, supra;*
Helvering v. *Stuart, supra.*

In looking through the form to the actuality this Court has directed the trier of facts:

(a) *To consider the use of the income*—Does it pay an obligation of the grantor, remain within the family as an economic unit or as a matter of fact, in some other way result in economic gain to the grantor—Does the grantor continue to control the disposition of the income?

Helvering v. *Clifford, supra.*

The District Judge in this case considered these questions and found, as a matter of fact, supported by the stipulation of the parties, that the income of the trust, pursuant to the directions of the trust agreement, was paid by the trustee to the beneficiary, an exempt religious association (R. 9, Item 6); that no part of the income went to the grantor or any member of his family or was used to discharge any legal obligation of the settlor or his family (R. 9, Item 7).

(b) *To consider the purpose and effect of powers reserved by the grantor.*

Helvering v. *Stuart, supra;*
Helvering v. *Clifford, supra.*

The District Court in this case considered these powers and found that the powers were not, in fact, exercised (R. 15); that the trustee was the sole administrator of the property (R. 15); that the stocks held by the trustee, constituting a little more than half the corpus of the trust (R. 9, Item 5, Ex. 2, R. 42) had belonged to the grantor's deceased wife and the grantor had coincidentally with his receipt of the stocks, created the trust (R. 8, Items 2, 3). No ulterior motive in the retention of voting rights is suggested and the Court found none. In connection with the power to veto changes in and reinvestments of securities amounting to approximately one-half of the corpus of the trust, the Court found no notes or securities executed by the grantor (R. 9, Ex. 3, R. 45), but a sound selection of municipal, county and United States bonds and mortgages. No ulterior motive in the retention of this power was suggested and the Court found none. In connection with the power to change the trustee, the Court found that a national bank had been chosen and not changed (R. 14). The Court judicially knew that many banks were failing in 1931 when this trust was created and this furnished a logical and true reason for the reservation of this power. No ulterior motive in the retention of this power was suggested and the Court found none.

The Court holds as a matter of fact:

> "* * * the reservations in the settlor fall short of an effective retention of ownership" (R. 14).

The Court of Appeals, in its decision of this case, gives no weight or consideration to this finding of fact by the trier of the facts, and, without finding the factual determination of the District Court clearly erroneous or lacking the support of substantial evidence, concludes that the income of this trust was taxable to petitioner as grantor

If taxation is a matter of actuality, and not fine spun legal theories when the Court looks through the form of the trust, and the tax is imposed, fine spun legal theories should not overcome actuality as a matter of defense when the Court looks through the form of the facts. Actuality is factual in its concept.

The decision of the Court of Appeals herein is in conflict with the authoritative decisions of this Court.

The decision is also in direct conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit on the same matter.

In the case of *Commissioner* v. *Williamson, supra,* the United States Circuit Court of Appeals for the Seventh Circuit holds, after reviewing the case of *Helvering* v. *Stuart, supra,* as follows:

> "If we are correct in this analysis of the Court's opinion, it follows that the appraisement must be made by the Board and its determination accepted unless we can say as a matter of law that it is erroneous." (ibid —.)

The same provision as Sec. 22(a) of the Revenue Act of 1934 is contained in all subsequent Revenue Acts.

Numerous cases have arisen under this section with conflicting views as to the effect of a finding of fact on the extent of a review in the appellate courts.

The view of the Seventh Circuit is supported by an earlier case from the Sixth Circuit, wherein the Court says:

> "Ordinarily the question of whether the facts in the case at bar being undisputed would bring the income arising to the trust within Sec. 22(a) to settlor is one of law, but the decision in the Clifford case seems to hold that whether or not such facts have the legal effect of proving ownership of income is one of fact * * *.

> We lack the power to decide the facts upon appeal no matter how clearly the record may disclose them."
>
> *Commissioner vs. Goulder,* 123 F. (2d) 686 (ibid p. 689).

The view of the Seventh Circuit is opposed by the majority opinion of the Third Circuit in the case of *Commissioner* v. *Brown,* 122 F. (2d) 800, but the dissenting opinion (Judge Maris) in the case states:

> "Furthermore, I think that the Supreme Court in the Clifford case indicated that the question whether a donor had retained such control over and benefits under a trust fund as to render its income his within the definition of Sec. 22(a), was a question of fact to be found by the triers of fact. It would follow under settled principles that the findings of the Board of Tax Appeals upon this question should not be reversed by us if supported by substantial evidence.
> (ibid p. 804.)

It seems to counsel for petitioner that the holding of the Court of Appeals in the *Williamson* case, the *Goulder* case, *and the dissenting opinion in the Brown* case, correctly interpret and are in accord with the holdings of this Court in the *Clifford, Hormel* and *Stuart cases.* If this is correct, then the holding in the instant case is clearly contrary to the authoritative decisions of this Court. If this is incorrect, and this Court has not finally determined this question, the conflict between the decisions of the Court of Appeals should be settled by this Court, and in either event, the writ should be granted in order to correct the action of the Court below or to settle the conflict involved.

C. The writ should be granted because of the conflict between the decision of the Circuit Court of Appeals herein reversing the District Court and holding as a matter of law or a mixed question of law and fact that the reservation of insubstantial powers by the grantor of an irrevocable trust for a term beginning July 21, 1931 and ending January 1, 1937, not exercised or reserved for any purpose or use other than the protection of the beneficiary, where the income from the trust was paid pursuant to the terms of the trust agreement to the beneficiary thereof for religious purposes, and the grantor, neither directly nor indirectly, received any economic gain, was nevertheless the income of the grantor under Sec. 22(a) of the Revenue Act of 1934, and the decisions of this Court in the cases of Helvering v. Clifford, supra; Hormel v. Helvering, supra; Helvering v. Stuart, supra, and because the decision herein is in direct conflict with a decision by the Circuit Court of Appeals for the Second Circuit in the case of Commissioner v. Chamberlain, 121 F.(2d), 765.

The petitioner in the instant case did not exercise any power reserved to him as grantor in the trust agreement. The trust was administered by a national bank as trustee. He received no economic gain from the income of the trust. The trust was an irrevocable trust for a term beginning July 21, 1931 and ending January 1, 1937. These facts were stipulated and found by the District Judge, as the trier of facts (R. 14).

The Court of Appeals holds that as a matter of law the unexercised powers reserved consisting of: (1) The right to veto changes in and proposed reinvestments of the corpus of the trust; (2) The right to vote stocks held as a part of the corpus of the trust; and (3) The right to substitute another trustee bound by the terms of the trust agreement

for the named trustee *plus the use of the income for a purpose giving non-material satisfaction to the grantor;* caused the grantor of the trust to be the owner of the corpus of the trust and the income taxable to him under Sec. 22(a) of the Revenue Act of 1934.

The question as to whether or not income is taxable to the grantor of a trust under Sec. 22(a) of the Revenue Act of 1934 is a question of fact to be determined by the "triers of facts", in accordance with the applicable principles of law.

Helvering v. *Clifford, supra;*
Hormel v. *Helvering, supra;*
Helvering v. *Rankin,* 295 U. S. 123;
Helvering v. *Stuart, supra;*
Commissioner v. *Williamson, supra.*

And this question cannot be considered initially in the appellate courts.

Helvering v. *Stuart, supra;*
Helvering v. *Richter,* 312 U. S. 561;
Hormel v. *Helvering, supra;*
Commissioner v. *Williamson, supra.*

Reservations of powers by the grantor of a trust, which, as a matter of law, fall short of complete control, cannot, as a matter of law, give the grantor thereof control of a trust so complete that it must be said the taxpayer is the owner;

Helvering v. *Clifford, supra;*
Helvering v. *Stuart, supra;*
Reinecke v. *Northern Trust Co.,* 278 U. S. 339.

nor is a trust completely controlled merely because it is a trust for a term of five and one-half years.

Helvering v. *Wood,* 309 U. S. 344;
Achelis v. *Helvering,* 112 F. (2d) 929;
Commissioner v. *Chamberlain,* 121 F. (2d) 765;

and where the taxpayer receives no economic gain—realized or realizable from the income of the trust, non-material satisfaction cannot be substituted therefor so as to make the grantor the owner of the corpus within the meaning of Sec. 22 (a) of the Revenue Act of 1934.

Helvering v. *Stuart, supra.*

Economic gain, realized or realizable by the grantor of a trust, is necessary before income is taxable to the grantor under Sec. 22 (a) of the Revenue Act of 1934.

Helvering v. *Stuart, supra.*

And while economic gain may be obtained through control of a trust so complete that it must be said the taxpayer is the owner;

Helvering v. *Clifford, supra;*
Helvering v. *Stuart, supra;*

the mere retention of powers not, in fact, exercised (R. 15) or reserved for any purpose or use other than the protection of the beneficiary (R. 9, Item 4, Ex. 2, R. 42) is not control in fact; and the sole reserved powers being:

> (a) To veto changes in and reinvestments of corpus, a negative power, the grantor having no right to direct changes or reinvestments, and the trust instrument not waiving the statutory restrictions [1] on investments by trustees, this power is but a limited control similar to that exercised by the Senate in approving or rejecting nominations of the President. For this power to amount to a complete control of the trust some factual use or abuse must appear. It cannot, as a matter of law, be control.

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[1] Code of Tennessee, Sec. 9596.1—
"All trustees, guardians and other fiduciaries in this state, unless prohibited, or another mode of investment is prescribed, by the will or deed of the testator or other person establishing the trust, may invest all funds in their hands in the following securities:"

(b) To vote stocks; while approximately one-half of the corpus of the trust consists of stocks, yet, the right to vote, if limited to the purpose of protecting the beneficiary of the trust, does not, in law, give the individual exercising the right complete control over the trust or any economic benefit therefrom. There must be a further purpose such as the control of a corporation at stake in the voting rights so exercised—but whether or not such a purpose exists apart from the formal terms of the instrument, is a *question of fact.* The limited right to vote stocks for the protection of the beneficiary cannot, as a matter of law, be control.

(c) To substitute trustees—but any successor to be bound by the terms of the trust. Here again, solely as a matter of law, this power does not give the grantor complete control of the trust. It must be administered in accordance with the terms of the trust agreement, whoever may be the trustee. The trustee is also subject to control by the courts at the instance of the beneficiary.[2] For this power to amount to a complete control of the trust there must be some factual situation giving rise to actual control or economic benefit. The limited powers alone cannot, as a matter of law, be control.

Commissioner v. *Branch*, 114 F. (2d) 985.

In the case of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, the Court considering the question of the effect of reserved powers as a matter of law on the ownership of the corpus of a trust, describes the reserved powers:

"The settlor reserved to himself power to supervise the reinvestment of trust funds, to require the trustees to execute proxies to his nominee to vote any shares of stock held by the trustees and to appoint successor trustees" (ibid 344);

---

[2] Code of Tennessee, Sec. 9573—

"The chancery, circuit, probate, and county courts have concurrent jurisdiction to accept the resignation of trustees or to remove and appoint trustees under the provisions of this chapter."

and as to their legal effect, says:

> "Nor did the reserved powers of management of the trust save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been complete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made" (ibid 346).

The mere reservation of these powers does not, therefore, as a matter of law, give to the grantor control over the economic benefits or enjoyment of the property.

The decision of the Circuit Court of Appeals herein is apparently in conflict with the authoritative decisions of this Court as to this matter.

The decision is also in conflict with the decision of the Circuit Court of Appeals for the *Second Circuit* on the same matter in the case of *Commissioner* v. *Chamberlain, supra.*

In the *Chamberlain case,* the grantor was one of two trustees, and as trustees they were expressly excused from investments of the character permitted by law; they were given broad powers in the management of the trust as to voting stocks, paying assessments, etc.; they were not required to give bond and the survivor, in case of death, or the remaining trustee, in case of resignation, without limitation, could name a successor trustee, or act alone. The trust was for a term of four years. The income was to be paid to the trustees of Columbia University for the purposes set out in the trust agreement.

The Commissioner insisted that the income was taxable to the grantor under the "non-material satisfaction" paragraph of the Horst case, or as assigned income under the

theory of that case and the case of *Helvering* v. *Eubank*, 311 U. S. 122.

The Court declined to follow the Commissioner's theory, and held that the grantor realized no economic gain from the income and that broad powers of management were insufficient to make the income taxable to the grantor.

In the brief of respondent in this case in the Circuit Court of Appeals, respondent admitted the conflict between the position taken by respondent in the court (as sustained by that Court) and the decision of the Circuit Court of Appeals for the Second Circuit, but insisted that the Second Circuit had failed to give full effect to the *Clifford case*.

The decision in this case by the Circuit Court of Appeals for the Sixth Circuit is the first holding by any Court, so far as petitioner is able to ascertain, taxing to the grantor of a trust actually created and extending beyond one year, income of a trust devoted to charitable purposes, where the grantor reserved no right to direct the use of the income. The right has been denied under varying circumstances in many cases, including:

Achelis v. *Helvering*, 112 F. (2d) 929;
Helvering v. *Bok*, Circuit Court of Appeals, Third Circuit, decided December 9, 1942, not officially reported;
Pierce v. *U. S.* (D. C. Minnesota), decided March 11, 1942, not officially reported.

The same provision as Sec. 22 (a) of the Revenue Act of 1934 is contained in all subsequent Revenue Acts. Undoubtedly, numerous term trusts for charitable purposes are created. It is respectfully submitted that this conflict of opinions of the Circuit Courts of Appeal should be resolved in the public interest.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

M. W. EGERTON,
Counsel for Petitioner.

(4887)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 810

MR. AND MRS. J. H. ANDERSON,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

M. W. EGERTON,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 810

MR. AND MRS. J. H. ANDERSON,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

I

Summary Statement of Matters Involved.

THE COMPLAINT

This is a suit brought by petitioners in the District Court of the United States for the Eastern District of Tennessee against the respondent for the recovery of income taxes erroneously and illegally collected from petitioners for the calendar year 1934, which taxes had been assessed and collected by reason of the Commissioner including as income of petitioners, the income of an irrevocable term trust established by petitioner, J. H. Anderson, for a term begin-

ning July 21, 1931 and ending January 1, 1937, the income from which was used for religious purposes, as provided in the trust agreement (R. 1-4).

The Answer

The respondent admitted the execution of the trust indenture but denied that the tax had been illegally assessed and collected (R. 6, 7).

The Facts

The case was tried on a written stipulation, the statements in which were true (R. 8). These statements (omitting those concerned with the payment and claim for refund of the tax) are as follows:

> "3. Plaintiff, on July 21, 1931, by indenture bearing that date, created a trust of the corpus of his deceased wife's estate for the benefit of the First Baptist Church of Knoxville, Tennessee, of which plaintiff and his deceased wife, until the time of her death, had been members. Plaintiff has continued to be a member of that Church since that time. The term of the trust was from July 21, 1931 to January 1, 1937, and was irrevocable during that period.
>
> "4. Plaintiff appointed the Hamilton National Bank of Knoxville, Tennessee, as trustee of the trust, and the Hamilton National Bank accepted such appointment as trustee. A copy of such trust indenture executed by plaintiff and the Hamilton National Bank, as trustee, is filed as Exhibit 2 hereto and is made a part hereof.
>
> "5. Plaintiff transferred and delivered the corpus of his deceased wife's estate to the Hamilton National Bank as trustee under the trust indenture. A copy of the receipt of the Hamilton National Bank of the corpus is attached hereto as Exhibit 3 and made a part hereof.
>
> "6. The Hamilton National Bank, as trustee, managed the trust estate, collected the income therefrom, and annually distributed the net income to the First Baptist Church of Knoxville, Tennessee, according to

the provisions of the trust indenture. The said First Baptist Church is an association, organized and operated exclusively for religious and charitable purposes, no part of the net earnings of which inures to the benefit of the plaintiff, or any other members or individuals, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and is exempt from taxation under the Revenue Act of 1934.

"7. No part of the income of the trust was distributed to plaintiff or any member of his family, or was used to discharge any legal obligation of plaintiff or his family, or to pay premiums for insurance on the life of plaintiff or his family."

Exhibit 3 to the stipulation (R. 9, Item 5, R. 45) shows that the corpus of the trust received by the trustee consisted of various stocks having a par value of $161,000.00; and notes, bonds and cash having a face value of $147,000.00. No notes or bonds executed by the grantor of the trust were among the securities so held.

Exhibit 2 to the stipulation (R. 8-9, Item 4, R. 42), the trust indenture, is summarized as follows:

The indenture is dated July 21, 1931, and is between petitioner, J. H. Anderson, and the Hamilton National Bank of Knoxville, as trustee.

The reason for the creation of the trust is set out as the desire of the petitioner, J. H. Anderson, to aid and assist the First Baptist Church of Knoxville, Tennessee, in its contributions to the cooperative program of the Southern Baptist Convention.

The corpus of the trust is created by the transfer and delivery to the trustee of securities and personal property.

The first paragraph provides for the trustee to collect the income from the corpus and pay it, less expenses and the fee of the trustee, to the First Baptist Church.

The second paragraph authorizes the trustee to invest, reinvest and exchange the securities of the trust for others

of equal value, but "in order that the settlor may safeguard the interest of the beneficiary" before exercising this power the trustee must obtain the approval of the settlor, or, in the event of his death, the approval of his executor.

The third paragraph reserves to the petitioner the right to vote all stocks held by the trustee "in order to enable the settlor to safeguard the interest of the beneficiary".

The fourth paragraph provides that stock dividends, if any, shall be considered principal.

The fifth paragraph provides that the trust is irrevocable for its term ending January 1, 1937, and for the transfer of the then corpus of the trust upon termination to the settlor or his executors.

The sixth paragraph authorizes the trustee to retain as part of the corpus any security originally deposited, without liability for depreciation in value, and permits the trustee to resign at any time upon thirty days' notice.

The seventh paragraph gives the settlor the right to change the trustee and provides that any successor trustee "shall undertake to perform the duties and obligations imposed upon the trustee herein".

The eighth paragraph provides for compensation to the trustee for its services and excuses qualification, bond and settlement as required by law.

The agreement is then executed by the parties on July 21, 1931.

The Opinion of the District Court

The District Court awarded petitioner a judgment, finding as a matter of fact, that the sole income from the corpus of the trust estate was paid to the cestui que trust, no legal duty resting upon the settlor to contribute any amount to the cestui que trust, and no part of the income or corpus, during the life of the trust, being diverted to any direct or

indirect legal reponsibility of the settlor; that the petitioner, in fact, received no economic gain and non-material satisfaction could not be substituted for economic gain; that the corpus of the trust was transferred and delivered to the trustee and that the trustee, in fact, was the sole administrator of the property and none of the controls reserved in the settlor were exercised; that these reserved powers were insubstantial and short of an effective retention of ownership (R. 14-15).

The Appeal and Decision on Appeal

The respondent appealed to the United States Circuit Court of Appeals for the Sixth Circuit, which Court, on December 2, 1942, reversed the decision of the District Court, holding (a) that the question of ownership, within the meaning of Sec. 22 (a) of the Revenue Act of 1934, was a question of law, or at least a mixed question of law and fact, and that a finding of fact by the District Court that petitioner was not the owner of the corpus of the trust, was subject to review on appeal as a conclusion of law (R. 23); (b) that the trust instrument involved established a technical trust only (R. 25); (c) that the use of the income for religious purposes, giving the settlor non-material satisfaction, was the equivalent of a use for family purposes; and (d) that petitioner remained the owner of the income of the trust, within the meaning of Sec. 22 (a) under the standards of the Horst and Clifford cases (R. 26).

Federal Statute Involved

The Federal statute involved is Sec. 22 (a) of the Revenue Act of 1934, reading as follows:

"Sec. 22. Gross Income.

(a) General Definition—'Gross income' includes gains, profits, and income derived from salaries, wages

or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly."

Revenue Act of 1934, Ch. 277, 48 Stat. 680 (U. S. C. Title 26, Sec. 22).

II

Jurisdiction.

The Court has jurisdiction to review the judgment of the Circuit Court of Appeals under Title 28 U. S. C. A., Sec. 347. The judgment of the United States Circuit Court of Appeals for the Sixth Circuit sought to be reviewed was rendered December 2, 1942 (R. 21); a petition to rehear having been seasonably filed, was denied on February 2, 1943 (R. 41); and the judgment became final on that date. This petition, together with a certified transcript of the record is filed in this Court within three months after said judgment became final.

III

The Questions Presented.

1. Is the question as to whether or not the grantor of a trust remains the owner of the corpus of the trust and taxable on the income thereof under Sec. 22 (a) of the Revenue Act of 1934, a question of fact to be determined by the trier

of the facts in accordance with the applicable principles of law, and, if supported by substantial evidence, subject to review by an appellate court for errors of law only, or is the issue one of law or mixed law and fact on which a Court of Appeals can made a new finding?

The Circuit Court of Appeals held herein that the issue was one of law—or mixed law and fact, and thereupon made a new finding, reversing the lower court.

Petitioner insists that the question is one of fact, and if the finding of the lower court is supported by substantial evidence, it is reviewable for errors of law only.

2. Does the grantor of a trust remain the owner of the corpus of the trust and taxable on the income thereof under Sec. 22 (a) of the Revenue Act of 1934, where the facts stipulated and found by the District Court, and not set aside by the Appellate court, were:

(a) That the trust was irrevocable and created for a term beginning July 21, 1931, and ending January 1, 1937.

(b) That the title to and possession of the corpus was transferred and delivered to the trustee and the trustee managed the trust estate.

(c) That the income of the trust was paid by the trustee, pursuant to the terms of the trust agreement, to a religious association for religious purposes and no part thereof was subject to any control of, or direction by, the grantor, and the grantor received no economic gain therefrom—but only non-material satisfaction.

(d) That no controls over the corpus reserved by the settlor were, in fact, exercised or reserved for any purpose other than the protection of the beneficiary and consisted only of (1) the power to veto changes in and reinvestments of the corpus; (2) the power to amend proxies to vote stocks, and (3) the power to substitute trustees, but any substitute trustee to be bound by the terms of the trust indenture.

The District Court answered this question "No."

The Circuit Court of Appeals answered this question "Yes."

Petitioner insists that it should be answered "No."

IV

Reasons Relied On for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals herein holding that the question as to whether or not the grantor of a trust remains the owner of the corpus and taxable on the income thereof under Sec. 22 (a) of the Revenue Act of 1934 is a question of law, or a mixed question of law and fact on which a Court of Appeals can make a new finding is a decision of a Federal question in a way probably contrary to the applicable decisions of this Court, including:

Helvering vs. *Clifford, 309 U. S. 331;*
Hormel vs. *Helvering, 312 U. S. 552;*
Helvering vs. *Stuart, 63 S. Ct. 140.*

2. The decision on this matter is in conflict with the decision of the Circuit Court of Appeals for the *Seventh Circuit* on the same matter in the case of *Commissioner* vs. *Williamson,* decided December 29, 1942, not yet officially reported.

3. The decision of the Circuit Court of Appeals herein holding that the income of a term trust devoted to religious purposes, giving only non-material satisfaction to the grantor, is substantially equivalent to income from such a trust devoted to family purposes and thereby taxable to the grantor under the standards set in the cases of *Helvering* vs. *Horst,* 311 U. S. 112 and *Helvering* vs. *Clifford,* 309 U. S. 331, is a decision of a Federal question in a way probably in conflict with the applicable decision of this Court in the case of *Helvering* vs. *Stuart,* 63 S. Ct. 140.

4. The decision of the Circuit Court of Appeals herein holding that the grantor of a trust remained the owner

of the corpus of the trust and taxable on the income thereof under Sec. 22(a) of the Revenue Act of 1934, as a conclusion of law or a mixed question of law and fact, where the facts as stipulated and found by the District Judge and not set aside by the Appellate Court, were:

(a) That the trust was irrevocable and created for a term beginning July 21, 1931 and ending January 1, 1937.

(b) That the title to and possession of the corpus was transferred and delivered to the trustee and the trustee managed the trust estate.

(c) That the income of the trust was paid by the trustee, pursuant to the terms of the trust agreement, to a religious association for religious purposes and no part thereof was subject to any control of, or direction by, the grantor, and the grantor received no economic gain therefrom—but only non-material satisfaction.

(d) That no controls over the corpus reserved by the settlor were, in fact, exercised or reserved for any purpose other than the protection of the beneficiary and consisted only of (1) the power to veto changes in and reinvestments of the corpus; (2) the power to demand proxies to vote stocks, and (3) the power to substitute trustees, but any substitute trustee to be bound by the terms of the trust indenture.

is a decision of a Federal question in a way probably contrary to the applicable decisions of this Court, including:

Helvering vs. *Clifford,* 309 U. S. 331;
Helvering vs. *Stuart,* 63 S. Ct. 140;
Hormel vs. *Helvering,* 312 U. S. 552.

5. The decision on this matter is in conflict with the decision of the Circuit Court of Appeals for the *Second*

Circuit in the case of *Commissioner* vs. *Chamberlain*, 121 F. (2d) 765.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Sixth Circuit had in the case numbered and entitled on its docket, No. 9086, United States of America, Appellant, vs. Mr. and Mrs. J. H. Anderson, Appellees, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Sixth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated —— —, 1943.

MR. AND MRS. J. H. ANDERSON,
By M. W. EGERTON,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 810

MR. AND MRS. J. H. ANDERSON,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

I.

Opinions of the Courts Below.

The opinion in the District Court (R. 13-15) was rendered on December 6, 1940, and is not officially reported.

The opinion of the Circuit Court of Appeals (R. 22-27) was rendered on December 2, 1942, and is reported in 132 F. (2d) 98.

II.

Jurisdiction.

1. The date of the decree of the Circuit Court of Appeals for the Sixth Circuit to be reviewed is December 2, 1942 (R. 21). A petition to rehear, seasonably filed, was

denied on February 2, 1943, on which date the decree became final (R. 41). This petition, together with a certified transcript of the record, is filed within three months after said decree became final.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Title 28, U. S. C. A., Sec. 347.

III.

Statement of the Case.

This has already been stated in the preceding petition, I (pps. 1-4), which is hereby adopted and made a part of this brief.

IV.

Specification of Error.

1. The Circuit Court of Appeals erred in reversing the District Court and holding that the question as to whether or not the grantor of a trust remains the owner of the corpus and taxable on the income thereof under Sec. 22(a) of the Revenue Act of 1934 is a question of law, or a mixed question of law and fact on which a Court of Appeals can make a new finding.

2. The Circuit Court of Appeals erred in reversing the District Court and holding that income of a term trust devoted to religious purposes, giving only non-material satisfaction to the grantor, is substantially equivalent to income from such a trust devoted to family purposes and thereby taxable to the grantor under the standards set in the cases of *Helvering* vs. *Horst,* 311 U. S. 112 and *Helvering* vs. *Clifford,* 309 U. S. 331.

3. The Circuit Court of Appeals erred in reversing the District Court and holding that the grantor of a trust

remained the owner of the corpus of the trust and taxable on the income thereof under Sec. 22(a) of the Revenue Act of 1934, as a conclusion of law or a mixed question of law and fact, where the facts as stipulated and found by the District Judge and not set aside by the Appellate Court, were:

(a) That the trust was irrevocable and created for a term beginning July 21, 1931 and ending January 1, 1937.

(b) That the title to and possession of the corpus was transferred and delivered to the trustee and the trustee managed the trust estate.

(c) That the income of the trust was paid, pursuant to its terms, to a religious association for religious purposes and no part thereof was subject to any control of, or direction by, the grantor, and the grantor received no economic gain therefrom—but only non-material satisfaction.

(d) That no controls over the corpus reserved by the settlor were, in fact, exercised or reserved for any purpose other than the protection of the beneficiary and consisted only of (1) the power to veto changes in and reinvestments of the corpus; (2) the power to demand proxies to vote stocks, and (3) the power to substitute trustees, but any substitute trustee to be bound by the terms of the trust indenture.

V.

Summary of the Argument.

A. The writ should be granted because of the conflict between the decision of the Circuit Court of Appeals herein holding that income from a trust, which, pursuant to the terms of the trust, is devoted to a religious cause, giving non-material satisfaction to the grantor is the equivalent

of income from a trust devoted to family purposes and the decisions of this Court in the case of Helvering vs. Stuart, supra.

1. The Circuit Court of Appeals holds herein:

   "To make financial sacrifice to piety, or to establish a strong and dominent religion, often brings a satisfaction of one's desires greater than that gained from similar sacrifices for blood kin. In our opinion, under the standard set in the Clifford and Horst cases, the income of the so-called present trust was taxable to the appellee" (R. 27).

2. The trust indenture involved provides for the payment of the income of the trust to a religious association (R. 9, Ex. 2, R. 42).

3. The income was paid to the association as provided (R. 9, Item 6).

4. The grantor of the trust received only non-material satisfaction (R. 9, Item 7).

5. Economic gain realized or realizable is necessary to produce a taxable income.

   Helvering vs. Stuart, supra.

6. Non-material satisfaction arising from the use of the income of a trust for religious purposes is not a taxable substitute for economic gain arising from the use of such income for family purposes under the standard of the *Horst (Helvering vs. Horst,* 311 U. S. 112) and *Clifford (Helvering vs. Clifford,* 309 U. S. 331) cases.

   Helvering vs. Stuart, 63 S. Ct. 140.

7. The decision of the Circuit Court of Appeals herein holding non-material satisfaction derived from a use of income for religious purposes to be the equivalent of economic gain derived from a family use of income is in direct conflict with the authoritative decision of this Court.

   Helvering vs. Stuart, supra.

B. The writ should be granted because of the conflict between the decision of the Court of Appeals herein holding that a finding under the facts by the District Judge that income of a trust is not income of the grantor thereof, within the meaning of Sec. 22(a) of the Revenue Act of 1934, supported by substantial evidence, is subject to review as a mixed question of law and fact by a Court of Appeals and not for errors of law only and the decisions of this Court in the case of Helvering v. Clifford, supra, Hormel v. Helvering, supra, and Helvering v. Stuart, supra, and because the decision herein is in direct conflict with a decision of the same matter by the Circuit Court of Appeals for the Seventh Circuit in the case of Commissioner v. Williamson, supra.

1. The District Judge found as a fact that the grantor of the trust was not the owner of the corpus of the trust and not taxable on the income thereof under Sec. 22(a) of the Revenue Act of 1934 (R. 14).

2. The question is one of fact for determination by the trier of the facts in accordance with applicable principles of law.

Helvering vs. Clifford, supra;
Helvering vs. Stuart, supra;
Commissioner vs. Goulder, 123 F(2d) 686;
Commissioner vs. Williamson, supra.

3. The District Judge having considered the factual relationship between the grantor of the trust and the use of the income and the purpose and effect of the controls reserved by the grantor over the corpus, and his determination being supported by substantial evidence, this finding can be reviewed on appeal only for errors of law.

Helvering vs. Stuart, supra;
Hormel vs. Helvering, supra;
Commissioner vs. Williamson, supra.

4. The decision of the Circuit Court of Appeals herein holding the question involved to be one of law or mixed law and fact and drawing a new conclusion as a matter of law without reference to the facts as found is contrary to the applicable decisions of this Court.

Helvering vs. Clifford, supra;
Hormel vs. Helvering, supra;
Helvering vs. Richter, 312 U. S. 561;
Helvering vs. Stuart, supra.

5. The decision of the Circuit Court of Appeals herein is directly contrary to that of the *Seventh Circuit* Court in the recent case of *Commissioner vs. Williamson, supra.*

C. The writ should be granted because of the conflict between the decisions of the Circuit Court of Appeals herein reversing the District Court and holding as a matter of law or a mixed question of law and fact that the reservation of insubstantial powers by the grantor of an irrevocable trust for a term beginning July 21, 1931 and ending January 1, 1937, in fact, not exercised or reserved for any purpose or use other than the protection of the beneficiary, where the income from the trust was paid pursuant to the terms of the trust agreement to the beneficiary thereof for religious purposes, and the grantor, neither directly nor indirectly, received any economic gain, was nevertheless income of the grantor under Sec. 22(a) of the Revenue Act of 1934, and the decisions of this Court in the cases of Helvering v. Clifford, supra; Hormel v. Helvering, supra; Helvering v. Stuart, supra; and because the decision herein is in direct conflict with a decision of the same matter by the Circuit Court of Appeals for the Second Circuit in the case of Commissioner v. Chamberlain, 121 F(2d) 765.

1. The question as to whether or not income of a trust is taxable to the grantor thereof under Sec. 22(a)

of the Revenue Act of 1934 is at least primarily a question of fact.

Helvering vs. Clifford, 309 U. S. 331;
Helvering vs. Stuart, 63 S. Ct. 140.

2. A finding of a trial court will not be set aside unless clearly erroneous.

Federal Rules of Civil Procedure, Rule 52(a).

3. Reservations of power by the grantor of a trust not in fact used or reserved by the grantor for some purpose other than the protection of the beneficiary, cannot give the grantor complete control of the corpus as a matter of fact.

4. Reservations of power by the grantor of a trust do not, as a matter of law, give the grantor control of the corpus unless they are so extensive that it must be said that the taxpayer is the owner.

Helvering vs. Clifford, supra;
Helvering vs. Stuart, supra;
Reinecke vs. Northern Trust Co., 278 U. S. 339;
Commissioner vs. Branch, 114 F. (2d) 985.

5. Ownership gives the right to income; the right to sell, pledge, give away or otherwise dispose of the corpus; to invest the corpus as owner sees fit; to manage the property and pay the income to whomsoever he will.

6. The negative powers reserved by the grantor herein to veto (not direct) investments; to vote (not sell—pledge—exchange—etc.) stocks; to substitute trustees (not manage, collect and distribute income and mingle the assets of the trust with his own), fall far short of ownership as a matter of law.

7. The use of income for a religious purpose, pursuant to the terms of the trust indenture giving the

grantor non-material satisfaction, is not a taxable substitute for economic gain.

8. Nor is a trust completely controlled as a matter of law merely because its term is approximately five and a half years.

Helvering v. *Wood*, 309 U. S. 344;
Commissioner v. *Chamberlain*, 121 F. (2d) 765.

9. The holding of the Circuit Court of Appeals in this case is apparently in conflict with the authoritative decisions of this Court.

10. The holding of the Circuit Court of Appeals in this case is in conflict with a decision of the Circuit Court of Appeals for the Second Circuit in the case of *Commissioner* v. *Chamberlain*, 121 F. (2d) 765.

11. The holding of the Circuit Court of Appeals in this case is the first holding the income of a charitable trust taxable to the grantor, and is contrary to other decisions on varying facts. The conflict should be resolved by this Court.

Argument.

A. The writ should be granted because of the conflict between the decision of the Circuit Court of Appeals herein holding that income from a trust, which, pursuant to the terms of the trust, is devoted to a religious cause, giving non-material satisfaction to the grantor is the equivalent of income from a trust devoted to family purposes and the decision of this Court in the case of Helvering v. Stuart, supra.

The petitioner in the instant case, neither directly nor indirectly, received any economic gain from the income of the trust established by him (R. 9, Item 7).

It was the insistence of the respondent in the Court below:

> "That the Clifford decision, when considered in the light of the clear implications of the Horst case, determines the issues here; and that the satisfaction which the taxpayer purchased by his transfer should be considered a taxable substitute for, and measured by, the income which he relinquished."

The Court of Appeals, in response to this insistence and in the concluding paragraph of its opinion, after quoting the "non-material satisfaction" paragraph of the opinion in the case of *Helvering* v. *Horst, supra,* holds:

> "To make financial sacrifice to piety or to establish a strong and dominant religion, often brings a satisfaction of one's desires greater than that gained from similar sacrifice for blood kin. In our opinion, under the standard set in the *Clifford* and *Horst* cases, the income of the so-called present trust was taxable to the appellee" (R. 27).

This opinion of the Court of Appeals was released shortly after the opinion of this Court in the case of *Helvering* v. *Stuart, supra,* wherein the statement in the *Horst* case was limited to its facts, and this Court held that "economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme".

The conclusion of the Court of Appeals in this case, being directly in conflict with the authoritative decision of this Court, it is respectfully submitted that the writ should issue.

B. The writ should be granted because of the conflict between the decision of the Court of Appeals herein holding that a finding under the facts by the District Judge that income of a trust is not income of the grantor thereof, within the meaning of Sec. 22(a) of the Revenue Act of 1934, supported by substantial evidence, is subject to review as a mixed question of law and fact by a Court of Appeals and not for errors of law only and the decisions of this Court in the cases of Helvering v. Clifford, supra, Hormel v. Helvering, supra, and Helvering v. Stuart, supra, and because the decision herein is in direct conflict with a decision of the same matter by the Circuit Court of Appeals for the Seventh Circuit in the case of Commissioner v. Williamson, supra.

The stipulation filed in this case provides "The statements contained in this stipulation are true" (R. 8). With the stipulation as a finding of fact, the District Judge, as the trier of facts, found:

> "The reservations in the settlor fall short of an effective retention of ownership * * *."
>
> "* * * the settlor was not himself the trustee, and although he reserved the right to change the trustee during the life of the trust, he never exercised the right, and according to the stipulation the trustee was sole administrator of the property trusteed and none of the controls reserved in the settlor was exercised * * *."
>
> "* * * since the sole income from the corpus estate, as a matter of actuality, was paid to the cestui que trust, no legal duty resting upon the settlor to contribute any amount to the cestui que trust, and no part of the income or corpus during the life of the trust being diverted to any direct or indirect legal responsibility of the settlor * * * the contention of the plaintiff is supported by the facts" (R. 14-15).

The question as to whether or not income is taxable to the grantor of a trust under Section 22 (a) of the Revenue

Act of 1934 is a question of fact to be determined by the triers of the facts in accordance with the applicable principles of law.

Helvering v. *Clifford, supra;*
Hormel v. *Helvering, supra;*
Helvering v. *Stuart, supra;*
Helvering v. *Richter,* 312 U. S. 561;
Helvering v. *Rankin,* 295 U. S. 123.

The form is to be disregarded and the actuality observed.

Helvering v. *Clifford, supra;*
Helvering v. *Stuart, supra.*

In looking through the form to the actuality this Court has directed the trier of facts:

(a) *To consider the use of the income*—Does it pay an obligation of the grantor, remain within the family as an economic unit or as a matter of fact, in some other way result in economic gain to the grantor—Does the grantor continue to control the disposition of the income?

Helvering v. *Clifford, supra.*

The District Judge in this case considered these questions and found, as a matter of fact, supported by the stipulation of the parties, that the income of the trust, pursuant to the directions of the trust agreement, was paid by the trustee to the beneficiary, an exempt religious association (R. 9, Item 6); that no part of the income went to the grantor or any member of his family or was used to discharge any legal obligation of the settlor or his family (R. 9, Item 7).

(b) *To consider the purpose and effect of powers reserved by the grantor.*

Helvering v. *Stuart, supra;*
Helvering v. *Clifford, supra.*

The District Court in this case considered these powers and found that the powers were not, in fact, exercised (R. 15); that the trustee was the sole administrator of the property (R. 15); that the stocks held by the trustee, constituting a little more than half the corpus of the trust (R. 9, Item 5, Ex. 2, R. 42) had belonged to the grantor's deceased wife and the grantor had coincidentally with his receipt of the stocks, created the trust (R. 8, Items 2, 3). No ulterior motive in the retention of voting rights is suggested and the Court found none. In connection with the power to veto changes in and reinvestments of securities amounting to approximately one-half of the corpus of the trust, the Court found no notes or securities executed by the grantor (R. 9, Ex. 3, R. 45), but a sound selection of municipal, county and United States bonds and mortgages. No ulterior motive in the retention of this power was suggested and the Court found none. In connection with the power to change the trustee, the Court found that a national bank had been chosen and not changed (R. 14). The Court judicially knew that many banks were failing in 1931 when this trust was created and this furnished a logical and true reason for the reservation of this power. No ulterior motive in the retention of this power was suggested and the Court found none.

The Court holds as a matter of fact:

> "* * * the reservations in the settlor fall short of an effective retention of ownership" (R. 14).

The Court of Appeals, in its decision of this case, gives no weight or consideration to this finding of fact by the trier of the facts, and, without finding the factual determination of the District Court clearly erroneous or lacking the support of substantial evidence, concludes that the income of this trust was taxable to petitioner as grantor.

If taxation is a matter of actuality, and not fine spun legal theories when the Court looks through the form of the trust, and the tax is imposed, fine spun legal theories should not overcome actuality as a matter of defense when the Court looks through the form of the facts. Actuality is factual in its concept.

The decision of the Court of Appeals herein is in conflict with the authoritative decisions of this Court.

The decision is also in direct conflict with a decision of the Circuit Court of Appeals for the Seventh Circuit on the same matter.

In the case of *Commissioner* v. *Williamson, supra,* the United States Circuit Court of Appeals for the Seventh Circuit holds, after reviewing the case of *Helvering* v. *Stuart, supra,* as follows:

> "If we are correct in this analysis of the Court's opinion, it follows that the appraisement must be made by the Board and its determination accepted unless we can say as a matter of law that it is erroneous." (ibid —.)

The same provision as Sec. 22(a) of the Revenue Act of 1934 is contained in all subsequent Revenue Acts.

Numerous cases have arisen under this section with conflicting views as to the effect of a finding of fact on the extent of a review in the appellate courts.

The view of the Seventh Circuit is supported by an earlier case from the Sixth Circuit, wherein the Court says:

> "Ordinarily the question of whether the facts in the case at bar being undisputed would bring the income arising to the trust within Sec. 22(a) to settlor is one of law, but the decision in the Clifford case seems to hold that whether or not such facts have the legal effect of proving ownership of income is one of fact * * *.

> We lack the power to decide the facts upon appeal no matter how clearly the record may disclose them."
>
> *Commissioner vs. Goulder,* 123 F. (2d) 686 (ibid p. 689).

The view of the Seventh Circuit is opposed by the majority opinion of the Third Circuit in the case of *Commissioner* v. *Brown,* 122 F. (2d) 800, but the dissenting opinion (Judge Maris) in the case states:

> "Furthermore, I think that the Supreme Court in the Clifford case indicated that the question whether a donor had retained such control over and benefits under a trust fund as to render its income his within the definition of Sec. 22(a), was a question of fact to be found by the triers of fact. It would follow under settled principles that the finding of the Board of Tax Appeals upon this question should not be reversed by us if supported by substantial evidence. (ibid p. 804.)

It seems to counsel for petitioners that the holding of the Court of Appeals in the *Williamson* case, the *Goulder* case, *and the dissenting opinion in the Brown* case, correctly interpret and are in accord with the holdings of this Court in the *Clifford, Hormel* and *Stuart* cases. If this is correct, then the holding in the instant case is clearly contrary to the authoritative decisions of this Court. If this is incorrect, and this Court has not finally determined this question, the conflict between the decisions of the Court of Appeals should be settled by this Court, and in either event, the writ should be granted in order to correct the action of the Court below or to settle the conflict involved.

C. The writ should be granted because of the conflict between the decision of the Circuit Court of Appeals herein reversing the District Court and holding as a matter of law or a mixed question of law and fact that the reservation of insubstantial powers by the grantor of an irrevocable trust for a term beginning July 21, 1931 and ending January 1, 1937, not exercised or reserved for any purpose or use other than the protection of the beneficiary, where the income from the trust was paid pursuant to the terms of the trust agreement to the beneficiary thereof for religious purposes, and the grantor, neither directly nor indirectly, received any economic gain, was nevertheless the income of the grantor under Sec. 22(a) of the Revenue Act of 1934, and the decisions of this Court in the cases of Helvering v. Clifford, supra; Hormel v. Helvering, supra; Helvering v. Stuart, supra, and because the decision herein is in direct conflict with a decision by the Circuit Court of Appeals for the Second Circuit in the case of Commissioner v. Chamberlain, 121 F.(2d), 765.

The petitioner in the instant case did not exercise any power reserved to him as grantor in the trust agreement. The trust was administered by a national bank as trustee. He received no economic gain from the income of the trust. The trust was an irrevocable trust for a term beginning July 21, 1931 and ending January 1, 1937. These facts were stipulated and found by the District Judge, as the trier of facts (R. 14).

The Court of Appeals holds that as a matter of law the unexercised powers reserved consisting of: (1) The right to veto changes in and proposed reinvestments of the corpus of the trust; (2) The right to vote stocks held as a part of the corpus of the trust; and (3) The right to substitute another trustee bound by the terms of the trust agreement

for the named trustee *plus the use of the income for a purpose giving non-material satisfaction to the grantor;* caused the grantor of the trust to be the owner of the corpus of the trust and the income taxable to him under Sec. 22(a) of the Revenue Act of 1934.

The question as to whether or not income is taxable to the grantor of a trust under Sec. 22(a) of the Revenue Act of 1934 is a question of fact to be determined by the "triers of facts", in accordance with the applicable principles of law.

Helvering v. *Clifford, supra;*
Hormel v. *Helvering, supra;*
Helvering v. *Rankin,* 295 U. S. 123;
Helvering v. *Stuart, supra;*
Commissioner v. *Williamson, supra.*

And this question cannot be considered initially in the appellate courts.

Helvering v. *Stuart, supra;*
Helvering v. *Richter,* 312 U. S. 561;
Hormel v. *Helvering, supra;*
Commissioner v. *Williamson, supra.*

Reservations of powers by the grantor of a trust, which, as a matter of law, fall short of complete control, cannot, as a matter of law, give the grantor thereof control of a trust so complete that it must be said the taxpayer is the owner;

Helvering v. *Clifford, supra;*
Helvering v. *Stuart, supra;*
Reinecke v. *Northern Trust Co.,* 278 U. S. 339.

nor is a trust completely controlled merely because it is a trust for a term of five and one-half years.

Helvering v. *Wood,* 309 U. S. 344;
Achelis v. *Helvering,* 112 F. (2d) 92º;
Commissioner v. *Chamberlain,* 121 F. (2d) 765;

and where the taxpayer receives no economic gain—realized or realizable from the income of the trust, non-material satisfaction cannot be substituted therefor so as to make the grantor the owner of the corpus within the meaning of Sec. 22 (a) of the Revenue Act of 1934.

Helvering v. *Stuart, supra.*

Economic gain, realized or realizable by the grantor of a trust, is necessary before income is taxable to the grantor under Sec. 22 (a) of the Revenue Act of 1934.

Helvering v. *Stuart, supra.*

And while economic gain may be obtained through control of a trust so complete that it must be said the taxpayer is the owner;

Helvering v. *Clifford, supra;*
Helvering v. *Stuart, supra;*

the mere retention of powers not, in fact, exercised (R. 15) or reserved for any purpose or use other than the protection of the beneficiary (R. 9, Item 4, Ex. 2, R. 42) is not control in fact; and the sole reserved powers being:

> (a) To veto changes in and reinvestments of corpus, a negative power, the grantor having no right to direct changes or reinvestments, and the trust instrument not waiving the statutory restrictions [1] on investments by trustees, this power is but a limited control similar to that exercised by the Senate in approving or rejecting nominations of the President. For this power to amount to a complete control of the trust some factual use or abuse must appear. It cannot, as a matter of law, be control.

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[1] Code of Tennessee, Sec. 9596.1—

"All trustees, guardians and other fiduciaries in this state, unless prohibited, or another mode of investment is prescribed, by the will or deed of the testator or other person establishing the trust, may invest all funds in their hands in the following securities:"

(b) To vote stocks; while approximately one-half of the corpus of the trust consists of stocks, yet, the right to vote, if limited to the purpose of protecting the beneficiary of the trust, does not, in law, give the individual exercising the right complete control over the trust or any economic benefit therefrom. There must be a further purpose such as the control of a corporation at stake in the voting rights so exercised—but whether or not such a purpose exists apart from the formal terms of the instrument, is a *question of fact.* The limited right to vote stocks for the protection of the beneficiary cannot, as a matter of law, be control.

(c) To substitute trustees—but any successor to be bound by the terms of the trust. Here again, solely as a matter of law, this power does not give the grantor complete control of the trust. It must be administered in accordance with the terms of the trust agreement, whoever may be the trustee. The trustee is also subject to control by the courts at the instance of the beneficiary.[2] For this power to amount to a complete control of the trust there must be some factual situation giving rise to actual control or economic benefit. The limited powers alone cannot, as a matter of law, be control.

Commissioner v. *Branch,* 114 F. (2d) 985.

In the case of *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, the Court considering the question of the effect of reserved powers as a matter of law on the ownership of the corpus of a trust, describes the reserved powers:

"The settlor reserved to himself power to supervise the reinvestment of trust funds, to require the trustees to execute proxies to his nominee to vote any shares of stock held by the trustees and to appoint successor trustees" (ibid 344);

---

[2] Code of Tennessee, Sec. 9573—

"The chancery, circuit, probate, and county courts have concurrent jurisdiction to accept the resignation of trustees or to remove and appoint trustees under the provisions of this chapter."

and as to their legal effect, says:

> "Nor did the reserved powers of management of the trust save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been complete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made" (ibid 346).

The mere reservation of these powers does not, therefore, as a matter of law, give to the grantor control over the economic benefits or enjoyment of the property.

The decision of the Circuit Court of Appeals herein is apparently in conflict with the authoritative decisions of this Court as to this matter.

The decision is also in conflict with the decision of the Circuit Court of Appeals for the *Second Circuit* on the same matter in the case of *Commissioner* v. *Chamberlain, supra.*

In the *Chamberlain case,* the grantor was one of two trustees, and as trustees they were expressly excused from investments of the character permitted by law; they were given broad powers in the management of the trust as to voting stocks, paying assessments, etc.; they were not required to give bond and the survivor, in case of death, or the remaining trustee, in case of resignation, without limitation, could name a successor trustee, or act alone. The trust was for a term of four years. The income was to be paid to the trustees of Columbia University for the purposes set out in the trust agreement.

The Commissioner insisted that the income was taxable to the grantor under the "non-material satisfaction" paragraph of the Horst case, or as assigned income under the

theory of that case and the case of *Helvering* v. *Eubank*, 311 U. S. 122.

The Court declined to follow the Commissioner's theory, and held that the grantor realized no economic gain from the income and that broad powers of management were insufficient to make the income taxable to the grantor.

In the brief of respondent in this case in the Circuit Court of Appeals, respondent admitted the conflict between the position taken by respondent in the court (as sustained by that Court) and the decision of the Circuit Court of Appeals for the Second Circuit, but insisted that the Second Circuit had failed to give full effect to the *Clifford case*.

The decision in this case by the Circuit Court of Appeals for the Sixth Circuit is the first holding by any Court, so far as petitioner is able to ascertain, taxing to the grantor of a trust actually created and extending beyond one year, income of a trust devoted to charitable purposes, where the grantor reserved no right to direct the use of the income. The right has been denied under varying circumstances in many cases, including:

Acheles v. *Helvering*, 112 F. (2d) 929;
Helvering v. *Bok*, Circuit Court of Appeals, Third Circuit, decided December 9, 1942, not officially reported;
Pierce v. *U. S.* (D. C. Minnesota), decided March 11, 1942, not officially reported.

The same provision as Sec. 22 (a) of the Revenue Act of 1934 is contained in all subsequent Revenue Acts. Undoubtedly, numerous term trusts for charitable purposes are created. It is respectfully submitted that this conflict of opinions of the Circuit Courts of Appeal should be resolved in the public interest.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

M. W. EGERTON,
Counsel for Petitioners.

(4888)

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519630—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 809

J. H. ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 810

MR. AND MRS. J. H. ANDERSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered a single memorandum opinion covering both cases (R. 13–15 [1]).

[1] With the exception of the years and amounts involved and the fact that the wife is a party in No. 810 by reason of the filing of a joint return, the records in the two cases are substantially identical. Accordingly references herein will be made only to the record in No. 809.

The decision is not officially reported. The opinion of the Circuit Court of Appeals (R. 22–27), likewise covering both cases, is reported at 132 F. 2d 98.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered December 2, 1942 (R. 21). Petitions for rehearing were filed on December 30, 1942 (R. 29), and orders denying the petitions were entered on February 2, 1943 (R. 41). The petitions for writs of certiorari were filed March 10, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer, in order to promote certain religious activities in which he was interested, created a trust the income of which, irrevocably for a period of about five and one-half years, was to be used for the furtherance of such purposes. Upon termination of the trust, title to the property comprising the corpus was to be restored to the taxpayer or his estate. The taxpayer retained broad powers of control over the management of the trust corpus, including the right, at any time, to remove the trustee and to appoint another. Was the taxpayer required to include the trust income as part of his gross income under Section 22 (a) of the Revenue Act of 1934?

STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly.

STATEMENT

The case was tried entirely upon a stipulation of facts agreed to by the parties (R. 8–10) and adopted by the trial court as the findings of fact (R. 13). The findings which are pertinent to the issues here may be summarized as follows:

On July 21, 1931, the taxpayer executed a deed of trust by which he transferred certain notes, bonds, and corporate shares, then owned by him,

to the Hamilton National Bank of Knoxville, Tennessee, as trustee (R. 8–9, 42–43). Under the terms of the trust, the trustee was directed to collect the income as earned by the trust, and, after deducting necessary expenses and its fees, to pay the same to the First Baptist Church of Knoxville, Tennessee (R. 43). Because the taxpayer was interested in the development and furtherance of Baptist denominational work in the southern states, as outlined and determined by the Southern Baptist Convention, the money received by the First Baptist Church was to be used by that organization as part of its contribution to the Southern Baptist Convention (R. 42, 43).

The taxpayer reserved the right to revoke the trust on January 1, 1937, but not prior to that date. Upon termination of the trust on January 1, 1937, the title to all the property forming the corpus of the trust was to be reconveyed and restored to the taxpayer if he should be living, and if not, to be turned over to the executors named in the will of the taxpayer to become a part of his residuary estate (R. 44).

The trust instrument provided that the trustee should have the power to invest and reinvest the corpus of the trust and to exchange the securities of the trust for other securities of equal value, provided consent and approval of such changes were first obtained from the taxpayer (R. 43).

The trust further provided that the taxpayer should have the right during the period of the trust to vote all stocks held by the trustee at any meetings held by the corporations issuing the same as fully as though the taxpayer were the owner of the stocks and if necessary, the trustee was directed to execute any proxies required for such purposes (R. 43).

Any stock dividends received by the trustee were not to be considered income but were to be added to the corpus of the trust (R. 43–44).

The taxpayer retained, without qualification, the right to remove the named trustee and to select a successor trustee (R. 44).

The trustee was empowered to retain the securities constituting the trust fund without liability for any depreciation in their valuation and was excused from qualification, bond, or settlement as required by law (R. 44, 45).

The taxpayer included the income of the trust in his income tax return and later filed a claim for refund of the amount of taxes represented by such income (R. 10). The claim was denied (R. 10) and this suit resulted (R. 1–6).

The trial court held that the income of the trust was not properly a part of the taxpayer's income and gave judgment to the taxpayer for the amount in suit (R. 13–16). The Circuit Court of Appeals for the Sixth Circuit on the Government's appeal reversed the judgment of the District Court

with direction to dismiss the taxpayer's petition (R. 21).

ARGUMENT

The Circuit Court of Appeals held that the taxpayer retained such a measure of control over the principal of the trust, that for reasons explained in *Helvering* v. *Clifford,* 309 U. S. 331, and *Helvering* v. *Horst,* 311 U. S. 112, he was to be regarded as the owner of the property, and the income therefrom was to be attributed to him under Section 22 (a). See also *Helvering* v. *Eubank,* 311 U. S. 122; *Harrison* v. *Schaffner,* 312 U. S. 579.

The taxpayer asserts (Pet. 8, Br. 23) the holding is in conflict with *Williamson* v. *Commissioner,* 132 F. 2d 489 (C. C. A. 7th), for the reason that the question involved is one of fact and the appellate court is bound by the finding of the trial court. He also asserts (Pet. 9–10, Br. 29–30) the decision is in conflict with *Commissioner* v. *Chamberlain,* 121 F. 2d 765 (C. C. A. 2d), in that the taxpayer here, in making his church the beneficiary of the trust income, received no economic gain. See also *Helvering* v. *Achelis,* 112 F. 2d 929 (C. C. A. 2d).

In further support of his petition the taxpayer suggests (Pet. 8–9) that the decision below probably is in conflict with *Helvering* v. *Clifford, supra; Hormel* v. *Helvering,* 312 U. S. 552, and *Helvering* v. *Stuart,* 317 U. S. 154.

Inquiry into the asserted and suggested conflicts discloses that they are without substantial merit.

Williamson v. *Commissioner, supra,* came before the Circuit Court of Appeals on an ultimate determination which the court was not prepared to hold as a matter of law was erroneous. In the instant case the reverse was true. But the difference in the cases was not one of principle. In neither case did the appellate court attempt to substitute its judgment as to the probative value of the evidentiary facts adduced. The difference in the cases lies in the fact that, here, the appellate court considered the ultimate determination of the trial court clearly erroneous by reason of its failure to apply to the evidentiary facts the proper principles of law as announced by this Court in *Helvering* v. *Clifford, supra,* and *Helvering* v. *Horst, supra.* See also *Harrison* v. *Schaffner, supra.*

Taxpayer's suggestion that the decision below conflicts with the expressions of this Court upon the point is equally without merit. That the "initial determination of whether or not on the facts of each case the grantor remains the owner for purposes of section 22 (a)" is a function of the trial court was not denied when the Circuit Court referred to the issue presented to it as being a mixed question of fact and law. *Helvering* v. *Clifford, supra,* p. 338; *Bogardus* v. *Com-*

missioner, 302 U. S. 34. If any continuing effect is to be given to the principles in *Helvering* v. *Clifford, supra,* and similar cases, clearly the initial determination cannot be considered so conclusive as to preclude review to ascertain if such principles have been applied.[2]

In his other contention that because of the absence of the family relationship the decision below conflicts with the decision of the Second Circuit in *Commissioner* v. *Chamberlain, supra,* the taxpayer has failed to note that court's later decision in *Commissioner* v. *Lamont,* 127 F. 2d 875, which is in harmony with the holding here. The *Chamberlain* case can not be regarded any longer as representing the views of the Second Circuit.

The final contention of the taxpayer is to the effect that the decision below probably is in conflict with *Helvering* v. *Stuart, supra,* because the nonmaterial satisfactions purchased by him through the medium of the trust may not be con-

[2] In *Woolley* v. *Commissioner*, No. 743, October Term, 1941, the petition for certiorari urged that the lower court erred in reversing (122 F. 2d 167 (C. C. A. 2d)) a decision of the Board of Tax Appeals holding the income of a trust not taxable to the grantor, because, under the *Clifford* case, the Board's ultimate finding, if supported by substantial evidence, was conclusive on appeal. The petition was denied, 314 U. S. 693. A similar contention was made in *Brown* v. *Helvering*, No. 658, October Term, 1942, with respect to the lower court's action (131 F. 2d 640 and 122 F. 2d 800 (C. C. A. 3d)). The petition there, likewise, was denied, March 1, 1943.

sidered economic gain for purposes of the statute. This contention appears to be based upon a distinction between the nonmaterial satisfactions accruing from a diversion of income to an object of his bounty beyond the family circle and one within the circle. *Cf. Helvering* v. *Horst, supra.* There appears to be no sound basis for such a distinction and the court below properly refused to recognize one. The *Stuart* case, when read in the light of its facts, affords no basis for the distinction, and the language of the opinion in the *Horst* case plainly supports the result reached herein.

The decision below is correct. It creates no conflict of principle between the circuits or with any decision of this Court. There appears no basis for invoking this Court's jurisdiction for the purpose of further review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
LYLE M. TURNER,
Special Assistants to the Attorney General.

APRIL 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

APR 30 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 809

J. H. ANDERSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

M. W. Egerton,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 809

J. H. ANDERSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

Comes now J. H. Anderson, the petitioner in the above entitled cause, and presents this, his petition, for a rehearing of the action of the Court in denying his petition for a writ of certiorari, and respectfully urges the Court to rehear and grant the writ;

I.

Because this is the first time the income of a charitable trust has been taxed to the grantor where the trust was of a longer duration than one year and both the Second and Third Circuits have denied the right of the Commissioner under these conditions (*Commissioner* v. *Bok,* 132 F. (2d) 365; *Commissioner* v. *Chamberlain,* 121 F. (2d) 765). In the *Lamont* case (*Commissioner* v. *Lamont,* 127 F. (2d) 875) the Second Circuit distinguishes the *Chamberlain* case but does not overrule it. The *Lamont* case involved a trust for

one year or less and the grantor exercised uncontrolled power to substitute such securities as she desired as well as other controls over the corpus.

Congress has expressly exempted trusts, the income from which is used to pay premiums on life insurance payable to a charitable beneficiary. (26 U. S. C. A. 167 (3).*[1] Here the income is payable directly to the charitable beneficiary and it seems to petitioner that every reason for congressional action exempting such trusts applies with greater force to trusts where the income is paid directly to the beneficiary without the intervention of an insurance policy and therefore discloses clearly the legislative policy in connection with a bona fide, validly created trust, the income from which is devoted to charitable purposes.

The conflict is real and, if income of a trust devoted to charitable purposes is to be taxed to the grantor of a trust where the grantor, in fact, exercised no control over the corpus thereof, it should be only after an authoritative decision of this Court so holding.

II.

Because the facts stipulated as true, that

(a) Petitioner neither received nor controlled any part of the income of the trust during its five and one-half year term (R. 8 item 7);

(b) Petitioner never exercised any control over the corpus of the trust during its term (R. 8 item 6);

---

*[1] (a) Where any part of the income of a trust—

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (o), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

must be disregarded or the rule that economic benefit must be received directly or indirectly to produce taxable income announced in *Helvering* v. *Stuart*, 317 U. S. 154, must be abandoned.

If the facts stipulated as true are accepted, then the rule that "economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme" has been violated since no income has been received or controlled by petitioner nor devoted to any use remotely giving him any economic benefit, and no control over the corpus of the trust was ever exercised by petitioner as a substitute for direct ownership.

To disregard these facts is to disregard actuality and tax to petitioner income which is not his and from which he has received no economic benefit and it is respectfully submitted that this is contrary to the applicable decisions of this Court and should be reviewed by this Court.

Wherefore, upon the foregoing grounds and for the reasons herein and in the original petition set out, it is most earnestly and respectfully urged that this petition for a rehearing be granted and that the action of the Court denying the writ of certiorari prayed for be upon further consideration reversed and the writ granted.

Respectfully submitted,

M. W. EGERTON,
Counsel for Petitioner.

I, Counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

M. W. EGERTON,
Counsel for Petitioner.

FILED
APR 30 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 810

MR. AND MRS. J. H. ANDERSON,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

H. W. Emerson,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 810

MR. AND MRS. J. H. ANDERSON,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

Respondent.

PETITION FOR REHEARING.

To The Honorable The Supreme Court of The United States:

Come now Mr. and Mrs. J. H. Anderson, the petitioners in the above entitled cause, and present this, their petition, for a rehearing of the action of the Court in denying their petition for a writ of certiorari, and respectfully urge the Court to rehear and grant the writ;

I.

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The conflict is real and, if income of a trust devoted to charitable purposes is to be taxed to the grantor of a trust where the grantor, in fact, exercised no control over the corpus thereof, it should be only after an authoritative decision of this Court so holding.

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(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (o), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

must be disregarded or the rule that economic benefit must be received directly or indirectly to produce taxable income announced in *Helvering* vs. *Stuart,* 317 U. S. 154, must be abandoned.

If the facts stipulated as true are accepted, then the rule that "economic gain realized or realizable by the taxpayer is necessary to produce a taxable income under our statutory scheme" has been violated since no income has been received or controlled by petitioner nor devoted to any use remotely giving him any economic benefit, and no control over the corpus of the trust was ever exercised by petitioner as a substitute for direct ownership.

To disregard these facts is to disregard actuality and tax to petitioner income which is not his and from which he has received no economic benefit and it is respectfully submitted that this is contrary to the applicable decisions of this Court and should be reviewed by this Court.

Wherefore, upon the foregoing grounds and for the reasons herein and in the original petition set out, it is most earnestly and respectfully urged that this petition for a rehearing be granted and that the action of the Court denying the writ of certiorari prayed for be upon further consideration reversed and the writ granted.

Respectfully submitted,

M. W. EGERTON,
Counsel for Petitioners.

I, Counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

M. W. EGERTON,
Counsel for Petitioners.